

STATE OF MICHIGAN
COURT OF APPEALS

BIORESOURCE, INC.,

Plaintiff-Appellee/Cross-Appellant,

and

OPPMAC, INC.,

Intervening Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant/Cross-
Appellee,

and

JOSEPH VASSALLO, PAUL BERNARD, and
FREDERICK ROTTACH,

Defendants-Appellants,

and

STATE OF MICHIGAN, CENTRAL
MAINTENANCE SERVICES, INC., SAM
FODALE, and JERRY FODALE,

Defendants.

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Appellants City of Detroit (the “city”) and individual defendants Joe Vassalo, Paul Bernard, and Frederick Rottach, appeal the trial court’s order that declared plaintiff the titleholder of real property located in the city, subject to a mortgage interest of Oppmac, Inc., and

UNPUBLISHED

August 17, 2006

No. 266668

Wayne Circuit Court

LC No. 01-123531-CH

liens in favor of Oppmac and the city for the amount paid by each to redeem the property. Plaintiff cross appeals and challenges the trial court's dismissal of its remaining tort claims for the recovery of damages stemming from the city's alleged wrongful possession and use of the property. We affirm.

Plaintiff filed this action in 2001 to quiet title to property in Detroit on which it failed to pay taxes for several years. Though the city had purportedly acquired the property years before in tax foreclosure proceedings, plaintiff alleged that notice of the foreclosure proceedings was not provided to a previous mortgagee and that the foreclosure proceedings were therefore void, making plaintiff the owner of the property. Plaintiff's complaint also alleged several tort claims seeking recovery of damages it allegedly sustained during the period the city claimed an interest in the property as a result of the foreclosure proceedings. Oppmac, as the successor in interest to the original mortgagee, was permitted to intervene. Oppmac argued that it was previously permitted to redeem the property in a prior lawsuit of its own, and that plaintiff's ownership interest in the property was thereby restored.

Originally, in 2002, the trial court granted the city's motion for summary disposition and held that plaintiff no longer had any interest in the property. Based on that ruling, judgment was entered in favor of all defendants on all of plaintiff's claims. Plaintiff and Oppmac both appealed that decision. This Court originally affirmed the trial court's decision in *Bioresource, Inc v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued May 27, 2004 (Docket Nos. 241137 and 241168) ("*Bioresource I*"). However, this Court thereafter granted plaintiff's and Oppmac's motions for rehearing. On rehearing, this Court reversed the trial court's decision in part and concluded that Oppmac had previously been permitted to redeem the property. This Court remanded the case for further proceedings to determine the effect of that redemption on the ownership of the property. *Bioresource, Inc v City of Detroit (On Rehearing)*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2004 (Docket Nos. 241137 and 241168), lv den 472 Mich 868 (2005) ("*Bioresource I, On Rehearing*").

On remand, plaintiff moved for partial summary disposition under MCR 2.116(C)(10). The trial court granted plaintiff's motion in part and agreed that its title to the property was revived by Oppmac's redemption of the property and that Oppmac and the city both had liens against the property for the amount paid by each to redeem the property. However, relying on this Court's prior decision in *Bioresource I, On Rehearing*, the trial court ruled that plaintiff was precluded from proceeding to trial on its remaining claims for damages and, accordingly, the court dismissed those claims.

Here, the city argues that Oppmac never properly redeemed the property and, therefore, plaintiff's ownership interest was never restored. In *Bioresource I*, this Court originally determined that plaintiff and Oppmac failed to prove that Oppmac redeemed the property because Oppmac was required to pay \$1,195,247.80, but only paid \$700,000 toward that amount. On rehearing, however, this Court agreed that the trial court in the Oppmac lawsuit had subsequently vacated the remaining balance of \$495,247.80, and allowed Oppmac to redeem the property for \$700,000. *Bioresource I, On Rehearing, supra*, slip op at 3-4.

The city maintains, however, that this Court erroneously determined in *Bioresource I*, *On Rehearing* that Oppmac redeemed the property for \$700,000, and that this Court should decline to follow that erroneous decision under the law of the case doctrine.¹

Whether the law of the case doctrine applies is a question of law for this Court. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). However, whether to apply the law of the case doctrine is also discretionary. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). The law of the case doctrine provides that “if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *City of Kalamazoo v Dep’t of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). “Likewise, a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court.” *City of Kalamazoo, supra*. Therefore, “a ruling on a legal question in the first appeal is binding on all lower tribunals and in subsequent appeals.” *Id.* “The primary purpose of the rule is to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit.” *Id.* An appellate court should modify its decisions only on rehearing. *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000).

The law of the case doctrine applies without regard to the correctness of the prior decision. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). Thus, a conclusion that a prior decision was erroneous is not sufficient by itself to ignore the law of the case doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992).

To do so would vitiate that doctrine because it would allow this Court to ignore a prior decision in a case merely because one panel concluded that the earlier panel had wrongly decided the matter. It would, therefore, reopen every case to relitigation of every issue previously decided in hopes that a subsequent panel of the Court would decide the issue differently than did the prior panel. Clearly, the law-of-the-case doctrine has no usefulness if it is only applied when a panel of this Court agrees with the decision reached by a prior panel. [*Id.*]

Nonetheless, the law of the case doctrine is discretionary and it is merely a practice of courts, not a limit on their power. *Grace, supra*. The doctrine will not be followed if the facts are no longer materially or substantially the same or if there has been a change in the law. *Id.*

¹ We note that the city conceded on remand that the law of the case doctrine applied with respect to the question whether Oppmac redeemed the property. “[A] party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court.” *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

Here, we reject the city's argument that the law of the case doctrine should not be applied with respect to this Court's determination in *Bioresource I, On Rehearing* that the property was redeemed by Oppmac.

The city has not demonstrated either a change in the facts or a change in the law to justify ignoring the law of the case doctrine. The city argues that Oppmac's payment of \$700,000 was insufficient to enable it to redeem the property because that amount did not cover all back taxes owed, including city and school board taxes for 1998 and 1999, and other amounts permitted by law. However, the panel in *Bioresource I, On Rehearing* was aware that the redemption amount was a contested issue in Oppmac's earlier lawsuit, but determined that Oppmac was permitted to redeem the property upon payment of \$700,000. More importantly, to the extent that the city is now arguing that the trial court in the Oppmac case erred in determining that the property could be redeemed for only \$700,000, this is not the appropriate case to raise these arguments. Instead, the city should have raised these arguments in the case brought by Oppmac, and if it disagreed with the trial court's decision, it should have filed an appeal.

We also decline to consider the city's argument that the trial court in the Oppmac case lacked subject-matter jurisdiction to vacate back taxes owed between 1994 and 1999. The city may not collaterally attack the trial court's ruling in the Oppmac case in this lawsuit. If the city disagreed with the court's ruling, it should have filed a direct appeal from that decision. *Welch v Dist Court*, 215 Mich App 253, 257; 545 NW2d 15 (1996). Likewise, the city is precluded from arguing in this case that the trial court in the Oppmac case could not properly vacate school taxes because it did not have personal jurisdiction over the Detroit School Board.² Any arguments regarding the city's responsibility for collecting school taxes should also have been raised in the Oppmac case, not this case.

For these reasons, the city has not demonstrated a basis for declining to apply the law of the case doctrine to this Court's prior determination in *Bioresource I, On Rehearing* that the subject property was redeemed by Oppmac. Because the city does not challenge the effect of Oppmac's redemption on plaintiff's ownership of the property, we affirm the trial court's determination that plaintiff is the titleholder to the property, subject to Oppmac's mortgage interest and liens in favor of the city and Oppmac for the amount paid by each to redeem the property.

In its cross appeal, plaintiff argues that the trial court erred in relying on this Court's prior decision in *Bioresource I, On Rehearing* to determine that plaintiff was precluded from proceeding to trial on its remaining tort claims for damages. We disagree.

All of plaintiff's tort claims were premised on its theory that defendants never properly acquired an interest in the property and that plaintiff always retained an ownership interest in the property because notice of the foreclosure proceedings was never provided to the original mortgagee, Land & Norry Associates. In *Bioresource I, On Rehearing*, however, this Court

² In any event, the city lacks standing to argue that the court did not have personal jurisdiction over another party. See *In re Terry*, 240 Mich App 14, 20-21; 610 NW2d 563 (2000).

rejected plaintiff's arguments that it continued to possess an interest in the property because of defects in the earlier foreclosure proceedings. This Court's prior decision on that issue is the law of the case. Given this Court's prior rejection of the underlying factual basis for each of plaintiff's tort claims, the trial court properly dismissed those claims. The court was not permitted to take action inconsistent with this Court's prior decision. *City of Kalamazoo, supra*. Plaintiff's reliance on *Meyering v Russell*, 85 Mich App 547, 552-553; 272 NW2d 131 (1978), is misplaced. Unlike the situation in *Meyering*, the factual predicate for plaintiff's tort claims was addressed in the prior appeal.³

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Helene N. White

³ In light of our decision, we need not address the city's alternative arguments for upholding the trial court's decision.